F.M.S. REPORTS.

[APPELLATE CIVIL JURISDICTION]

AITKEN, J.

April 8, 1938.

W. ELPHINSTONE.....Defendant (Appellant)

vs.

LEE LENG SAN.....Plaintiff (Respondent)

[PERAK MAGISTRATE'S CIVIL APPEAL No. 13 of 1938]

False imprisonment—arrest by police constables on a traffic charge—negligence of police officer—absence of malice—Public Authorities Protection Enactment (Cap. 30), Section 2 Subsection (ii).

In a suit against an officer of the Police for damages for false imprisonment in that the plaintiff was arrested by two police constables at the entrance of the Court on a charge of driving a lorry with inefficient brakes, the Magistrate found that the arrest was effected through the negligence of the defendant and without reasonable or probable cause and awarded the plaintiff damages and costs. The defendant appealed to the Supreme Court.

Held, that the tort of false imprisonment cannot be committed negligently, that all policemen and officers are not responsible for one another's wrongful acts unless such acts are done by subordinates on the orders or instructions of their seniors, and that in the absence of proof of malice, the defendant was entitled to the protection of the Public Authorities Protection Enactment, Section 2.]

MAGISTRATE'S CIVIL APPEAL.

The facts of the case so far as they are material to this report are set out in the judgment below.

Hay for the Appellant.

Chabra for the Respondent.

Cur. Adv. Vult.

AITKEN, J.—In this case the Respondent sued the Appellant, who is an officer in the F.M.S. Police, for $500 damages for an alleged false imprisonment.

The Appellant, by his defence, denied (1) that he had caused the Respondent to be imprisoned, and (2) that he had acted maliciously or negligently, or without reasonable or probable cause. He also pleaded reliance on the provisions of the Public Authorities Protection Enactment, and the provisions of that Enactment, on which both parties to this case rely, read as follows:—

> 2. "Where any action, prosecution or other proceeding is commenced against any person for any act done in pursuance or execution or intended execution of any Enactment or Rules made thereunder or of any public duty or authority or in respect of any alleged neglect or default in the execution of any such Enactment, Rules, duty or authority the following provisions shall have effect—
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> (ii) In every action so brought it shall be expressly alleged that the defendant acted maliciously or negligently and without reasonable or probable cause, and if at the trial the plaintiff shall fail to prove such allegation judgment shall be given for the defendant."

The case was heard by the learned Magistrate at Taiping on the 6th and 13th days of January 1938, and judgment was reserved to the 3rd of February 1938. On that latter date the learned Magistrate delivered a carefully considered judgment, in which he held that the Appellant had negligently caused the Respondent to be arrested without reasonable or probable cause, and awarded the Respondent $50 by way of damages and $20 by way of costs. From this decision of the learned Magistrate the Appellant has appealed to me, and before I deal with the questions of law and fact raised by this appeal it appears to be desirable that I should set out, as concisely as possible, the facts and circumstances out of which this case arose.

The Respondent is a lorry driver, and for some time past he has been driving a lorry in the neighbourhood of Taiping which is registered in the name of his wife. The Appellant is an officer of the F.M.S. Police, and was in charge of the Traffic Branch of the Police Force at Taiping at the time when the acts complained of occurred.

On the 10th of June, 1937, the Appellant's predecessor in office, Mr. V. Powell Evans, sent a notice to the Respondent informing the latter that he, Mr. Powell Evans, was prepared to compound the offences of obstructing his lorry number plates and driving it with inefficient brakes on a public thoroughfare for the sum of $6. The notice stated that unless the offer to compound was accepted within 7 days from the date thereof, proceedings by summons would be instituted.

The Respondent did not accept this offer to compound, and on the 29th of June, 1937, Mr. Powell Evans caused a summons to be issued which called upon the Respondent to appear before the Magistrate at Taiping on the 9th of July, 1937, and answer a charge of having obstructed the number plate of the lorry he was driving. For some reason, which has not been vouchsafed to us, Mr. Powell Evans did not take out a summons for the other offence mentioned in his notice to compound, that is, the offence of driving the lorry with inefficient brakes. It is reasonable, however, to infer that he decided not to go on with it.

The Summons for obstructing the lorry's number plate was duly served on the Respondent and the case appears to have come before the learned Magistrate for the first time on the 9th of July, 1937, when it was fixed for hearing on

the 15th of that month. Various adjournments followed which need not be specifically mentioned, but it is important to note that the 21st of August, 1937, is the last date but one to which it was adjourned for hearing. It came before the Magistrate's Court at Taiping on that date and then adjourned to the 26th of August, 1937, when it was finally heard and disposed of. In point of fact the Respondent was acquitted on the charge of obstructing his number plate, but we are not concerned with the result of that case. We are only concerned with the fact that it was before the learned Magistrate on the 21st of August, 1937, and would, presumably, have been heard on that day if the time of Court had not been otherwise occupied.

The Appellant took over the duties of the Traffic Branch of the Police Force at Taiping from Mr. Powell Evans on the 9th of July, 1937. One of those duties, and an important one, is the prosecution of all traffic offences in the local Magistrate's Court. It so happened that when the Appellant took over those duties there were two summonses for traffic offences outstanding against the Respondent:—

1. A summons for overloading the lorry he was driving which was issued on the 7th of June, 1937, and
2. The summons for obstructing the number plate, which was issued on the 29th of June, 1937.

Both these summonses were eventually adjourned to the 21st of August, 1937, the first of them having been part heard on the previous day.

On the 21st of August, 1937, the Appellant arrived at the Magistrate's Court shortly before 9 a.m. the usual hour of commencement. He tells us that whilst he was waiting for the learned Magistrate, a Police Corporal drew his attention to the fact that the Respondent had only been summoned in respect of one out of the two alleged offences specified in Mr. Powell Evans' Notice to Compound of the 10th of June, 1937. Upon this he, the Appellant, as the Respondent was present in Court and in order to save everybody's time, entered a charge against the Respondent for driving a lorry with inefficient brakes on a public thoroughfare—the other alleged offence specified in the notice to compound—in the Police Charge book. From the Police Charge Book this new charge against the Respondent was copied right away into the charge book kept by the Clerk of the Court pursuant to Section 176 of the Criminal Procedure Code.

It would seem that the learned Magistrate entered the Court very soon after this new charge had been entered as above mentioned, and the hearing of the part heard charge against the Respondent for having overloaded his lorry was resumed and resulted in the Respondent's acquittal an hour or so later. Upon the pronouncement of a verdict in his favour, it seems clear enough that the Respondent left the place where he was sitting and walked to one of the entrances to the Court intending to leave it. When he arrived at that entrance he was stopped by two or three Policemen, who led him to the dock. As he stood there, the new charge of driving the lorry on a public thoroughfare with inefficient brakes was read and interpreted to him by the Court's Chinese interpreter. He claimed trial and the hearing was postponed. The Court allowed bail in the sum of $25/-, and on executing a bond in that amount the Respondent left the Court.

There is no real conflict of evidence in regard to the Respondent having been stopped at the entrance to the Court and brought to the dock by two or three policemen, but there is a sharp conflict of evidence as to whether those policemen were acting on their own initiative or on instructions given them by the Appellant. According to the Respondent he was arrested at the instance of the Appellant, because he saw the latter point his hand towards him as he was leaving the Court. This statement is to some extent corroborated by the Respondent's dubious witness Ng Cheng Kian, who states that he saw the Appellant waving his hand at two policemen as the Respondent was leaving the Court, whereupon the two policemen followed the Respondent and brought him back from the door of the Court to the dock. According to the Appellant he was facing the learned Magistrate whilst the Respondent was stopped at the entrance to the Court and brought back to the dock, and was quite unaware that anything unusual had happened. He denies that he pointed at the Respondent or gave any order for his arrest, but admits that he probably called out the official number of the new charge and the Respondent's name, in accordance with the established procedure of the Court as set out at the end of the learned Magistrate's Notes of Evidence.

It is unfortunate that the learned Magistrate, in his otherwise helpful judgment, omitted to deal specifically with the very important issue raised by this conflict of evidence. I say "very important issue" because, on the view I take of the law, the result of this appeal depends entirely on the answer to the question "Was the Respondent arrested as the result of any orders or instructions given by the Appellant to the Policemen who actually barred his exit from the Court and led him back to the dock, or were those policemen acting on their own volition?" In other words, if the Respondent was arrested as the result of any such orders or directions. then the Appellant has committed the tort of "false imprisonment" and is liable to the Respondent in damages. but if the policemen who arrested the Respondent—and I do not doubt for a moment that there was a technical arrest

followed by a "false imprisonment"—were not acting on any such orders or instructions when they did so, then the Appellant is not liable.

A careful study of the learned Magistrate's judgment as a whole has, however, inclined me to the view that he accepted the Appellant's denial of having either pointed at the Respondent as he was leaving the Court or given any orders for his arrest. The learned Magistrate finds, as a fact:

1. That the Respondent was arrested; and
2. That the Appellant caused his arrest through negligence.

In his judgment he states the Appellant's negligence to have been (a) his omission to find out why Mr. Powell Evans had not sued out a summons for the alleged offence of driving the lorry with inefficient brakes; (b) his failure to sue out a summons himself when he knew that a summons was the correct procedure; and (c) his entry of the inefficient brakes charge in the Police Charge Book though no summons had been issued and it was not an offence for which the Respondent could be arrested. It seems to me that the only proper inference to be drawn from these findings is that the learned Magistrate did not think the Appellant had intentionally brought about the Respondent's arrest and imprisonment.

Having drawn that inference, it seems to me that I must allow this appeal, because, on my view of the English Law of Torts, (1) the tort of false imprisonment cannot be committed negligently, and (2) all policemen and officers are fellow servants of the State and not responsible for one another's wrongful acts unless such acts are done by subordinates on the orders or instructions of their seniors. I am aware, of course, that Section 2 (ii) of the Public Authorities Protection Enactment lays it down that every action brought against an allegation that he "acted maliciously or negligently and without reasonable or probable cause," and I am also aware that both the learned counsel who argued this appeal did so on the assumption that if the Appellant did, in fact, act negligently, he is liable; but those words in that sub-section cannot, in my opinion, be read as creating a new tort of false imprisonment by negligence which can only be committed by public officers. The words which I have just quoted certainly raise some difficult problems of construction such as, for example, what is a reasonable or probable cause for negligence on the part of a public officer; but in the case of a claim for damages for false imprisonment, which is not a tort of negligence, I do not see how they can be read otherwise than as compelling the Plaintiff to plead that the act complained of was done maliciously and without reasonable or probable cause. It is therefore of interest to note that the learned Magistrate, in his judgment, has expressly negatived malice on the part of the Appellant though he found, quite properly, that there was no reasonable or probable cause for the Respondent's imprisonment.

For the reasons set out above I have decided to allow this appeal, and Section 2 (iii) of the Public Authorities Protection Enactment constrains me, somewhat reluctantly, to make an order that the Respondent do pay the Appellant his solicitor and client costs both here and in the Court below. My reluctance to make such an order as to costs is due to the fact that the Appellant undoubtedly brought these proceedings upon his own head by his careless disregard of the law relating to the issue of summonses for offences against our Motor Vehicles Legislation. To paraphrase and amplify a remark of the learned Magistrate, an attempt to save the time of the Court may be very well meant, but if it results in the wrongful imprisonment of a citizen, even for only a few minutes of time, more harm is done than good.

Appeal allowed.

[APPELLATE CRIMINAL JURISDICTION]

CUSSEN, J.

April 14, 1938.

RAMASAMY .....**Appellant.**

vs.

PUBLIC PROSECUTOR.....**Respondent.**

[SELANGOR MAGISTRATE'S CRIMINAL APPEAL No. 97 of 1937].

Criminal Law—enticing away a married woman—proof of marriage—sufficiency of—meaning of "taking"—Penal Code S. 498.

In a prosecution under section 498 of the Penal Code for enticing away a married woman marriage between the complainant and the woman alleged to have been enticed is sufficiently proved by evidence of the actual ceremonies performed at the "marriage" and by expert evidence to show that those ceremonies constituted a valid marriage.

A case under the section is established if it can be shown that the accused personally and actually assisted the wife to get away from the custody of the husband or of any person having the care of her on his behalf.

MAGISTRATE'S CRIMINAL APPEAL.

R. P. S. Rajasooria for Appellant.

M. C. Hay, Deputy Legal Adviser, for Respondent.

Cur. Ad. Vult.

CUSSEN, J.—This is an appeal against a conviction of an offence under section 498 Penal Code.

The argument of counsel for the Appellant proceeded on two grounds—

(1) that there was no sufficient proof of the marriage and

(2) that there was no evidence of advances and solicitations from the accused man to the married woman.

In support of the first contention the judgment of Whitley, J. in *Rex* vs. *Govindasamy* (Singapore Special Case No. 1 of 1932, II Malayan Law Journal 97) was cited. There it is laid down that "this being a criminal case the